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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 529

WILLIAM IRWIN DENNY, et al.
(RODNEY BROWNE STARR, PLAINTIFF No. 4),
PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 9, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether a retired Navy enlisted man, who is recalled to active duty and temporarily promoted to Lieutenant Commander under the provisions of the Temporary Promotions Act and then released from active duty, is entitled to have his retired pay computed under the Pay Readjustment Act of 1942.

STATUTES INVOLVED

The Act of May 7, 1932, 47 Stat. 150, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all warrant officers and enlisted men who served in the Army, Navy, Marine Corps, or Coast Guard of the United States during the World War or the Spanish-American War, and whose service during such war was creditable, and who have been or hereafter may be retired according to law, shall on the date of approval of this Act or upon retirement in the case of those now on the active lists of the services named herein, be advanced in rank on the retired list to the highest commissioned, warrant, or enlisted grade held by them during such war: *Provided*, That nothing in this Act shall entitle any of the personnel described herein, while on active duty, to any other rank than that in which they were serving at the time of retirement: *And provided further*,

That no increase in active or retired pay or allowances shall result from the passage of this Act.

The Temporary Promotions Act of July 24, 1941, 55 Stat. 603-605, provides in pertinent part as follows:

* * * * *

Sec. 2. (a) As used in this Act, the words "temporarily appointed" shall be interpreted to mean also "temporarily promoted" or "temporarily advanced in rank", as the case may be.

(b) The following personnel may be temporarily appointed to ranks or grades in the Regular Navy or Marine Corps, not above lieutenant in the Navy and captain in the Marine Corps:

* * * * *

(3) First-class petty officers and above in the Regular Navy and platoon or staff sergeants and above in the Regular Marine Corps, including enlisted men of those grades on the retired list on active duty.

(4) Enlisted men of the Fleet Reserve and the Fleet Marine Corps Reserve on active duty in the grades herein specified for enlisted men of the Regular Navy or Marine Corps.

* * * * *

Sec. 7. (a) The permanent, probationary, or acting appointments of those persons temporarily appointed in accordance with the provisions of this Act shall not be vacated by reason of such temporary appointments, such persons shall not be prejudiced thereby in regard to promo-

tion, advancement, or appointment, in accordance with laws relating to the Regular Navy or Marine Corps, and their rights, benefits, privileges, and gratuities shall not be lost or abridged in any respect whatever by their acceptance of commissions or warrants hereunder; * * *.

* * * * *

Sec. 10. Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency. Upon the termination of their temporary status such personnel shall, unless otherwise provided herein, revert to their permanent grades, ranks, or ratings, but upon being subsequently retired or in the case of retired officers returned to an inactive status, they shall, on condition that their performance of duty under such temporary appointments has been satisfactory, be placed on the retired list, or advanced thereon as the case may be, with the highest rank held by them while on active duty: *Provided*, That except where specific provision is made otherwise, their retired pay shall be based on the pay of the rank or rating held at the time of retirement: *Provided further*, That nothing in this Act shall entitle such personnel, when recalled to active duty, to any other rank or rating than that in which they were serving at the time of retirement.

Section 8(a) of the Act of February 21, 1946 (P.L. 305), 60 Stat. 28, amending Section 10 of the Act of July 24, 1941, *supra*, provides in pertinent part as follows:

Sec. 8. (a) Section 10 of the Act approved July 24, 1941 (55 Stat. 605), is hereby amended to read as follows:

"Sec. 10. (a) Personnel appointed or advanced under the authority of this Act may be continued in their temporary status during such period as the President may determine, but not longer than six months after the termination of war or national emergency or, in the case of reserve and retired personnel, not longer than the period herein specified or the date of release from active duty whichever is the earlier and in no case longer than six months after the termination of war or national emergency. Upon the termination of their temporary status such personnel on the active list of the Regular Navy and Marine Corps shall assume their permanent status and those of the retired list and of the respective Reserve Components, including the Fleet Reserve and Fleet Marine Corps Reserve, shall have, when returned to an inactive status, the highest grade and rank in which, as determined by the Secretary of the Navy, they served satisfactorily under a temporary appointment, unless entitled to the same or higher grade and rank pursuant to section 8 of this Act, as now or hereafter amended.

"(b) (1) Personnel of the retired list returned to an inactive status with higher rank pursuant to subsection (a) shall receive retired pay computed at the rate prescribed by law and applicable in each individual case but based upon such higher rank.

* * * * *

"(d) Personnel accorded higher rank pursuant to this section shall, if subsequently assigned

active duty, be recalled to active duty in the grades, ranks or ratings, with which they were retired or returned to an inactive status unless under other provisions of law they are entitled to higher grades, ranks, or ratings. * * *"

* * * *

Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942, 56 Stat. 359, 368; 37 U.S.C. 115, provides as follows:

> The retired pay of any officer of any of the services mentioned in the title of this Act who served in any capacity as a member of the military or naval forces of the United States prior to November 12, 1918, hereafter retired under any provision of law, shall, unless such officer is entitled to retired pay of a higher grade, be 75 percentum of his active duty pay at the time of his retirement.

STATEMENT

The facts before the Court of Claims were not in dispute and may be summarized as follows: Petitioner entered active duty in the United States Navy on February 3, 1903 as an enlisted man. After receiving a temporary appointment as Lieutenant (j.g.), he was retired as a chief petty officer on February 1, 1934. Eighteen days later, petitioner was advanced on the retired list to the rank of Lieutenant (j.g.) as provided by the Act of May 7, 1932, *supra*.

On July 14, 1941, petitioner was recalled to active duty as a chief petty officer and subsequently received successive temporary appointments as authorized by

Section 2 of the Temporary Promotions Act of 1941, *supra*. After having been temporarily appointed to the rank of Lieutenant Commander, on August 30, 1946, he was released from active duty and returned to inactive duty on the Retired List (Pet. 4-5).

In accordance with the provisions of Section 10(a) of the Temporary Promotions Act of 1941, as amended, petitioner's temporary appointment to the rank of Lieutenant Commander was terminated at the time of his release from active duty and he reverted to his permanent enlisted rating of chief petty officer. Under the authority of the same section, however, he was subsequently advanced on the Retired List to the rank of Lieutenant Commander—the highest temporary rank in which he served satisfactorily, as determined by the Secretary of the Navy (Pet. 5).

Since petitioner's release from active duty in 1946, his retired pay has been computed, as provided by Section 10 (b)(1) of the Temporary Promotions Act of 1941, as amended, at the rate prescribed by statutes applicable to enlisted men, but based upon the monthly pay of his rank of Lieutenant Commander on the retired list. By his suit in the Court of Claims, petitioner sought to recover the difference between his present retired pay, which is computed upon the basis of approximately 60% of his active duty pay, as Lieutenant Commander, and retired pay as computed upon the basis of 75 per cent of his active duty pay as a Lieutenant Commander as provided in Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942.

On cross motions for summary judgment, the Court of Claims held that petitioner's retirement rights derive exclusively from Section 10(a) and 10(b) of the Temporary Promotion Act of 1941, and that he was not entitled to have his retired pay computed under the Pay Readjustment Act of 1942. Accordingly, the court granted the Government's motion for summary judgment and dismissed the petition (Pet. 5).

ARGUMENT

Following its previous decision in *Jones* v. *United States*, 151 C. Cls. 119, 282 F. 2d 906, certiorari denied, 365 U.S. 880, the Court of Claims has held that petitioner is not entitled to the retired pay benefits prescribed by Paragraph 4 of Section 15 of the Pay Readjustment Act of 1942. This holding is based on a clearly correct construction and application of the pertinent statutory provisions. Accordingly, further review by this Court is not warranted.

Prior to his release from active Navy duty on August 30, 1946, petitioner was serving under a temporary appointment as a Lieutenant Commander pursuant to Section 10 of the Temporary Promotions Act of 1941. Section 10(a) of that Act specifically provided that petitioner's temporary appointment as an officer would terminate on the date of his release from active duty and that, upon the termination of his temporary status, he would assume his "permanent status," *i.e.*, his permanent enlisted status as a chief petty officer, retired. When he returned to an inactive status in accordance with Section 10(a),

petitioner was entitled to, and has been accorded, the highest rank on the retired list in which, as determined by the Secretary of the Navy, "[he] served satisfactorily under a temporary appointment * * *." And, by Section 10(b) of the Temporary Promotions Act of 1941, upon his return to an inactive status with the higher rank in which he served satisfactorily, petitioner was entitled to, and is receiving, "retired pay computed at the rate prescribed by law * * * but based upon [his] higher rank" as Lieutenant Commander.

Section 10 of the Temporary Promotions Act is, of itself, definitive and dispositive of petitioner's rights. His claim to the more remunerative benefits of Section 15, Paragraph 4, of the Pay Readjustment Act of 1942 is plainly without merit. Section 15, paragraph 4, applies only to officers of the Navy "hereafter retired." *Jones* v. *United States*, *supra*. After serving under a temporary appointment as an officer in the Navy, petitioner was released from active duty, but he was not and could not have been retired as an officer. It follows that the court below was correct in holding that, on the facts of petitioner's case, he does not qualify for retired pay pursuant to Section 15, Paragraph 4, of the Pay Readjustment Act of 1942.

The decision is not, moreover, at variance with the legislative history of the 1946 Amendment to the Temporary Promotions Act. Consistent with the import of petitioner's extracts from the committee hearings on the 1946 amendment, petitioner's service in the higher temporary rank of Lieutenant Commander

is recognized in the retired pay he currently receives pursuant to Section 10(b) of the Temporary Promotions Act. In addition, on the retired list he carries the highest rank held during the war. By the plain terms of the controlling statute, he is entitled to no more.[1]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1963

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[1] There is no basis for petitioner's reliance upon the fact that, at the time he was recalled to active duty in 1941, he was a lieutenant (j.g.) on the retired list. Contrary to his apparent belief, his rank on the retirement list was only temporary and was to be terminated upon recall to active duty. Act of May 7, 1932, *supra*, pp. 2-3. This statutory directive is reflected by his reentry on active duty as a chief petty officer, and not as a commissioned officer. In short, petitioner's permanent status throughout the period between 1934 (when he first retired) and 1946 was that of chief petty officer. It is also noteworthy that the 1932 Act, under which petitioner initially obtained commissioned status on the retired list, expressly provides that it was not to be used to effect an increase in retired pay.

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